88-1034

Supreme Court, U.S.
FILED
DEC 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

QUENTIN M. DERRYBERRY II,

Defendant-Petitioner,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Circuit Court erred in not reversing petitioner's conviction for perjury on the grounds that petitioner's purportedly perjurious testimony was given in response to a question that was ambiguous as a matter of law.

Whether the Circuit Court erred in not reversing petitioner's conviction for perjury on the ground that the decision of the Bankruptcy Court on which the Circuit Court relied in reversing petitioner's conviction for embezzlement on grounds of res judicata was also res judicata as to petitioner's conviction for perjury.

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REPORT OF OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals affirming petitioner's conviction for perjury and reversing petitioner's conviction for embezzlement is not officially reported but a copy of the opinion is set forth in the Appendix hereto as Exhibit A. The order denying petitioner's petition for rehearing is set forth in the Appendix hereto as Exhibit B. The bankruptcy court opinion on which the Sixth Circuit relied in reversing petitioner's conviction for embezzlement on grounds of res judicata, and on which petitioner relies for his argument that his conviction for perjury should also be reversed, is reported at 50 B.R. 852 (N.D. Ohio, 1985). A copy of that opinion has also been included in the Appendix hereto as Exhibit C.

JURISDICTIONAL STATEMENT

The opinion and order of the Sixth Circuit Court of Appeals was dated and entered on August 24, 1988. Petitioner's petition for rehearing before the Sixth Circuit was denied in an order issued and entered on October 13, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. 1954, in that petitioner petitions from the final judgment and order of the Sixth Circuit Court of Appeals affirming petitioner's conviction for perjury on Count III of the government's indictment.

STATEMENT OF THE CASE

Petitioner, Quentin M. Derryberry II, is a lawyer currently under temporary suspension by the Supreme Court of the State of Ohio pending resolution of all of petitioner's appellate rights in this matter. Prior to his suspension in September of 1987, petitioner had been a practicing attorney for approximately fifteen years in the State of Ohio. During all of those years and, in fact, preceding his admission to the bar in Ohio, petitioner served as a bankruptcy trustee in the United States Bankruptcy Court for the Northern District of Ohio, Western Division.

In the latter part of 1981, petitioner was appointed as trustee in the bankruptcy matter of In Re James R. Hartley d/b/a Hartley Trucking Co.,

Case No. 81-01855. Shortly after his appointment as trustee for the Hartley estate, petitioner was informed by one of the Hartley creditors of the identity of one Merle C. Weber. Mr. Weber was a self-proclaimed and self-styled "creditor's representative" who was working on behalf of certain creditors of the Hartley estate to help recover those creditors' claims. Petitioner met Mr. Weber in November, 1981 and was impressed with Weber's knowledge of the affairs leading to the downfall of the Hartley Trucking Company. Over the course of the next few months, petitioner worked closely with Mr. Weber, drawing on Weber's knowledge of Hartley's business. In December, 1981, after petitioner had discussed with an attorney, Mr. George Ferstle, the possibility of Mr. Ferstle's acting as counsel for the

trustee in the Hartley matter, a meeting with certain creditors was held at petitioner's office. The purpose was to discuss the possibility of the creditors advancing funds for the purpose of paying Mr. Ferstle's attorneys fees so that he could prosecute actions on behalf of the Hartley estate and attempt to recover assets for the creditors. (Except for certain causes of action and some small amount of office equipment, the Hartley estate had no assets.) Petitioner attended only the first part of this meeting, despite the fact it was hosted in his office. At the conclusion of the meeting, there was no definitive agreement on behalf of the creditors to commit to advancing money to the estate for legal fees.

In early 1982 Mr. Weber offered to loan petitioner money for petitioner's

personal expenses. Petitioner was in need of funds because so much of his time was devoted to investigation of the Hartley matter for which petitioner was not receiving any current compensation and would not receive any compensation until such time as the bankruptcy court might approve an application for trustee's or attorney's[1] compensation. Petitioner accepted Mr. Weber's offer to loan him money. In the period of time from early January, 1982, to early March, 1982, petitioner received loans totalling approximately $22,500 from Mr. Weber. Unbeknownst to petitioner, at the same time that Mr. Weber was loaning petitioner money, Mr. Weber was also soliciting creditors of the Hartley estate to advance funds to the estate for

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[1]As an attorney petitioner was also able to represent the Hartley estate as counsel.

the prosecution of claims against third parties by the trustee.

Mr. Weber had some degree of success in his solicitations. In April, 1982, Mr. Weber informed Mr. Ferstle, counsel for the trustee, that he was holding a certain sum of money (he did not identify the amount) which he had obtained from creditors of the Hartley estate for the purpose of establishing a litigation fund. Mr. Ferstle, after consulting with petitioner on this matter, drafted an Application for Instructions and Advice to be presented to the bankruptcy court, Judge Krasniewski, for determination of: 1) whether or not the trustee could accept the funds held by Mr. Weber in order to utilize them for a litigation fund; 2) if so, under what conditions could the funds be accepted; and 3) would the advancement of such funds receive an

administrative priorty in the bankruptcy proceedings. The Application was presented to the bankruptcy court and a hearing was held thereon on May 27, 1982. At that time Judge Krasniewski determined that the trustee was authorized to accept the funds in question if they were tendered to him, but that there could be no limitation placed on the trustee's use of such funds by the creditors. (The trustee was known to be contemplating filing actions against certain Hartley creditors, in particular The Peoples Banking Company of McComb("McComb Bank"). Such creditors were more than hesitant to contribute to a litigation fund to help support litigation which might ultimately be directed at themselves.) Judge Krasniewski entered an order on June 4, 1982, embodying his ruling at the May 27 hearing. By a hand-written attachment to

that order, the funds then being held by Mr. Weber were first identified by amount and contributor and totalled $13,880.

After the June 4 order, petitioner essentially left the matter of the funds being held by Mr. Weber to his counsel, Mr. Ferstle, whose fees were to be paid out of any litigation fund. Mr. Weber did not offer to tender the fund to petitioner or his counsel, Mr. Ferstle. In the latter part of 1983 when petitioner as trustee was preparing cases to file against various entities, including McComb Bank, petitioner made inquiry of Mr. Weber as to whether or not he was going to tender the funds which were the subject of the June, 1982 order. Mr. Weber informed petitioner at that time that he did not know whether he was still authorized by the creditors to

tender such funds to petitioner.

In November 1983, after petitioner had filed an action on behalf of the Hartley Estate against the McComb Bank, the Bank, acting for itself and on behalf of all creditors of the Hartley estate, the largest of which creditors was the United States government, brought a motion to remove petitioner as trustee of the Hartley estate and an action on petitioner's bond to recover certain funds which McComb Bank alleged were property of the Hartley estate and which petitioner had failed to take control of for the estate. Specifically the funds in question consisted of the $13,880 which the Bank alleged had been given by various creditors of the Hartley estate to Mr. Weber as contributions for a litigation fund. McComb Bank originally contended that it had given $6,000 to Mr.

Weber for the litigation fund but later changed its position to reflect a contribution of $3,500. The Bank contended that by virtue of the Bankruptcy Court's June 4, 1982 order, petitioner was under an obligation to collect "the $13,880" from Mr. Weber and that he failed to do so.

The trial in the Bankruptcy Court on the motion to remove petitioner as trustee of the Hartley estate and on the action against petitioner and his bonding company to recover the funds purportedly given by creditors to establish the litigation fund did not take place until April of 1985. The evidence adduced at trial was to the following effect. Petitioner freely admitted that he had received personal loans from Mr. Weber in 1982 and 1983 in the amount of approximately $27,500. (Apart from the

$22,500 loaned to petitioner by Mr. Weber in January, February and March, 1982, petitioner and his wife accepted an additional loan of $5,000 from Mr. Weber in February, 1983.) Petitioner identified a $3,500 cashier's check drawn on McComb Bank made payable to petitioner individually, with no mention of his position as trustee of the Hartley estate, as being one of two cashier's checks drawn on the McComb Bank that Mr. Weber had given to petitioner as part of the loan transactions between Mr. Weber and petitioner. The other check was for $2,500. [2] As previously noted, the Bank had originally contended that its contribution to the alleged Hartley litigation fund was $6,000 but then

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[2]Petitioner had in fact informed the court of the loan transactions with Mr. Weber over a year earlier in February of 1984.

stated its contribution was only $3,500.

Mr. O.J. Huffman, president of the Bank, testified in the bankruptcy proceeding that the same $3,500 check identified by petitioner as being part of his personal loan transactions with Mr. Weber was, in fact, the check which the Bank had issued for its contribution to the Hartley litigation fund and which the Bank had given to Mr. Weber to give to petitioner for that purpose.

Petitioner testified that in late April of 1982, he was first informed by his counsel, Mr. Ferstle, that Mr. Weber was holding an undisclosed amount of money received from certain creditors of the Hartley estate which those creditors wished to contribute to a litigation fund. Pursuant to this information, petitioner, acting through his counsel, submitted to the bankruptcy court the Application for Instructions and Advice,

prepared by petitioner's counsel and Mr. Weber, seeking to determine whether petitioner as trustee could receive this money, use it as a litigation fund, and if so, under what conditions it could be received.

Bankruptcy Judge Krasniewski entered his order of June 4, 1982 authorizing petitioner to accept the funds, if tendered. In response to requests by petitioner over the course of the next year, Mr. Weber did not tender the funds to petitioner, stating that he was not sure that he was still authorized by the creditor-contributors to do so. In November 1983, petitioner was informed by one of the creditor-contributors, C. Richard Gottfried, that the check which Mr. Gottfied had given Mr. Weber for the fund had actually been made out to petitioner as trustee and had been endorsed by Mr. Weber purportedly as

agent for the trustee. Thereafter petitioner undertook an action against Mr. Weber to collect the funds, utilizing as his basis for the action the forged endorsement on Mr. Gottfried's check. Petitioner obtained a default judgement against Mr. Weber in the amount of $13,880. However, petitioner was unable to collect on the judgement. Although Mr. Weber had exhibited to petitioner in February of 1984 a copy of a passbook from an account in an Arizona bank in which "the $13,880" was purportedly kept, when petitioner sought to execute on the account it was discovered that the account was in the name of Mr. Weber's son and had never had more than $500 in it.

After hearing all the evidence, on June 20. 1985, Judge Krasniewski issued his Memorandum Opinion and Order. (See Appendix, Exhibit C; also reported at 50

B.R. 852 (N.D. Ohio, 1985.) In that opinion the court found that its order of June 4, 1982 did not obligate the trustee to collect the funds held by Mr. Weber but rather merely authorized the trustee to accept the funds and that contrary to the McComb Bank's contention, the funds were not property of the estate. (Appendix, Exhibit C, pp. 30-31; 50 B.R. 861) The court also stated:

> The $13,880 was never turned over to the trustee by Mr. Weber.
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> ****
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> The uncontroverted testimony at trial was that the creditors gave the money to Mr. Weber. One of those contributors was Peoples Bank which gave $3,500 to Mr. Weber. Further evidence that the funds were put in Mr. Weber's control by the creditors is found in the Trustee's Application for Instructions and Advice filed April 30, 1982. That document which sought advice from the court on the propriety of accepting $13,880 from the creditors stated that the money was deposited with Mr. Weber. <u>There being no evidence that the money was ever presented to the Trustee</u> the Court

> must find that the allegation that he allowed it to fall into the hands of Mr. Weber is completely without merit.

See, Appendix Exhibit C, pp. 8, 27 and 28; 50 B.R. 852 at 856, 860. (Emphasis added.) The Bankruptcy Court, therefore, denied the creditors' petition for removal of the trustee and dismissed the creditors' action for recovery of damages against the trustee and his bonding company.

In spite of the full and fair hearing before the Bankruptcy Court, for which the government, as the largest creditor of the Hartley Estate, was given notice and an opportunity to participate, the government would not abide by the Bankruptcy Court's decision. In August of 1986 the government charged petitioner in a four count indictment. Count I charged petitioner with conspiracy with Mr. Weber to embezzle the $13,880 from

the Hartley Estate. Count II charged petitioner with embezzlement from a bankruptcy estate, in violation of 18 U.S.C. Section 153, of $8,500 of the $13,880, consisting of the $3,500 check from McComb Bank and $5,000 from another creditor, Midwest Insurance.These latter funds Mr. Weber had informed petitioner were funds owed to Mr. Weber personally by Midwest. Count III charged petitioner with perjury in violation of 18 U.S.C. section 1623,in his testimony before the Bankruptcy Court in the April, 1985 hearing when counsel for the McComb Bank asked petitioner, "Have you ever had possession of any of that $13,800?" and petitioner responded "No, Sir." Count IV also charged petitioner with perjury in the April, 1985 hearing in that petitioner informed the Bankruptcy Court that he had no knowledge of Mr. Weber's forged endorsements on certain checks

which had been made out to petitioner and which comprised part of "the $13,880" until he received the letter from Mr. Gottfried in November, 1983.

Petitioner moved to dismiss the indictment on the grounds of the res judicata and collateral estoppel effects of the Bankruptcy Court ruling and, specifically with respect to Count III, on the grounds that petitioner's perjurious testimony was given in response to an inherently ambiguous question. The trial court denied the motion to dismiss the indictment and petitioner proceeded to trial in January, 1987 before a jury. The jury returned its verdict on January 30, 1987, finding petitioner not guilty of conspiracy with Mr. Weber to embezzle funds from the Hartley estate; guilty of embezzling the $8,500 from the Hartley estate, and guilty of perjury in saying that he had

never had possession of any of that $13,880. The jury reached no verdict with respect to Count IV and the district court entered judgment of acquittal thereon.

On appeal, the Sixth Circuit adopted the government's statement of facts from its brief without considering that petitioner had presented contrary evidence in the trial court. Nevertheless, after chastising petitioner in dicta, the Sixth Circuit ruled that the bankruptcy court proceedings were res judicata with respect to the charges of embezzlement in Count III and reversed the judgment of the trial court on that count. The Sixth Circuit affirmed the trial court's judgment on the perjury charge in Count III, finding that there was no ambiguity in the question posed to petitioner. Petitioner filed for rehearing in the Sixth Circuit, again

pointing to the ambiguity of the question and the fact that the res judicata finding in Count II was equally applicable to the charges in Count III. The Sixth Circuit denied the petition for rehearing in a one line order.

ARGUMENT

Petitioner's conviction for perjury on Count III of the government's indictment must be reversed because of the inherent ambiguity in the question asked and because of the res judicata and collateral estoppel effects of the Bankruptcy Court order of June 20, 1985. In Bronston v. United States, 409 U.S. 352 (1973), this Court was presented with a case in which the defendant was charged with perjury in a federal bankruptcy proceeding. The defendant, testifying under oath, had been asked whether he currently had any bank accounts in Swiss banks. He responded, no. He was then asked whether he had ever had any such accounts. He responded that his company had an account there for about six months. Defendant made no direct response to the question. The government indicted the defendant for perjury based

on its evidence that defendant had maintained a personal bank account in Switzerland at one time. Defendant was convicted by a jury and this Court granted the writ of certiorari. The Court reversed the defendant's conviction for perjury, finding that a witness could not be convicted of perjury for giving an answer under oath that is literally true, albeit unresponsive and arguably misleading by its negative implication. This Court stated that "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry...precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 360 and 362.

In the case presently before this Court, the basis of petitioner's conviction for perjury is that when he was asked whether he had ever had any of "the $13,880" he responded, "No, sir."

The government's contention at trial was that the $3,500 McComb check and the $5,000 Midwest check were part of "the $13,880" and that petitioner, therefore, perjured himself in his denial. The inherent ambiguity of the question presented petitioner is obvious from the fact that petitioner, in the same proceeding in which he denied having any of "the $13,880," readily admitted that he had received the $3,500 McComb Bank check and had received other funds from Mr. Weber, part of which, had he been asked to identify them, consisted of the $5,000 Midwest check. It would have been patently absurd for petitioner to deny ever having had any of "the $13,880," if he thought that the reference to "the $13,880" in counsel's question included the very funds which he had already testified to receiving. However, his denial of receiving any of "the $13,880"

is perfectly consistent with the understanding that " the $13,880" was the amount purportedly held by Mr. Weber in a separate account at the time of the hearing on the Application for Instructions and Advice in May, 1982.

Apart from the patent absurdity of petitioner testifying to a denial of ever having had any of "the $13,880" if he understood the term to indicate the very funds which he had already testified to receiving, the Bankruptcy Court also did not understand petitioner's testimony in the light portrayed by the government. In the April, 1985, trial Judge Krasniewski heard Mr. Huffman say that McComb Bank had contributed the $3,500 check to a litigation fund in February, 1982. That same amount was identified in the June, 1982 Order as being the amount given by McComb Bank to Weber for the litigation fund. Judge Krasniewski heard

petitioner testify that he had received that same $3,500 check from Weber as part of a loan. The Bankruptcy Court heard petitioner testify he had received $24,000 in other funds from Weber as part of that loan, including $11,000 in January, 1982, which, in part, was derived from the $5,000 Midwest Insurance check. Judge Krasniewski heard Mr. Clark, the Bank's attorney, specifically ask defendant whether or not he, petitioner, had ever had any of "the $13,880." Petitioner responded "No, sir."

Judge Krasniewski, no less than the defendant, understood that question to mean something different than the government's interpretation of the question. In the face of the flat out admission by the defendant that he had received the same $3,500 check which Peoples Bank of McComb claimed was its

contribution to the litigation fund and had received the additional $5,000 in January, 1982, which could have been shown to be the purported Midwest contribution to the litigation fund, Bankruptcy Judge Krasniewski found that "the $13,880 was never turned over to the trustee by Mr. Weber...and that there was no evidence that the money was ever presented to the trustee." (Appendix, Exhibit C, pp.8, 27 and 28.)

Judge Krasniewski obviously understood defendant's response not to mean that he had never received the $3,500 check or the $5,000 check from Midwest, but rather that he had not received any of "the $13,880" which Weber informed petitioner, petitioner's counsel, the Bankruptcy Court and various creditors he was holding as the contributions of various creditors to a litigation fund. The government's understanding of the

question when juxtaposed with the Bankruptcy Court's obvious understanding of the question, underscores the inherent ambiguity of the question and mandates that such a question should not, as a matter of law, have been presented to a jury as the basis for an indictment for perjury.

Moreover, the Bankruptcy Court's findings in its June 20, 1985, Order, stating that "the $13,880 was never turned over to the Trustee by Mr. Weber" and that there was "no evidence that the money ("the $13,880") was ever presented to the trustee, act as res judicata and collateral estoppel of an essential element of the government's indictment for perjury in Count III. That is, that the testimony of the defendant in response to the question was false. Judge Krasniewski heard the testimony of both Mr. Huffman and petitioner. For

reasons made very clear in his Opinion and Order, he believed petitioner. As a matter of law, therefore, Judge Krasniewski's Opinion is conclusive of the factual determination of whether or not defendant's testimony is false.

For the reasons hereinbefore set forth, petitioner Quentin M. Derryberry II prays that this Honorable Court grant this Petition for Certiorari and reverse petitioner's conviction for perjury on Count III of the government's indictment.

Respectfully submitted,

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